J.H. RAYNER (MINCING LANE) LTD. & ORS.

v.

MANILAL & SONS (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C22-7 OF 1986]
28 FEBRUARY 1986

CIVIL PROCEDURE: *Injunction - Injunction granted - Dissolution of injunction - Institution of similar proceedings here - Abuse of process of Court - No specific prayer for stay - Stay of proceedings ordered - Undertaking by plaintiff unenforceable - No assets within jurisdiction - Subsidiary company different entity from holding company - Veil of incorporation not lifted.*

The plaintiffs are foreign companies carrying on business in London & New York. The two defendants are companies incorporated in Malaysia and carrying on business in Malaysia, the 2nd defendant being a subsidiary of the first. Pursuant to debts owing to plaintiffs, a letter of undertaking was given. However, the undertaking was unfulfilled. Plaintiffs commenced action in London against the 1st defendant and its associate companies and obtained a Mareva Injunction on 11 January 1986. The plaintiffs filed a writ against the defendants and injunction was granted.

In the 2 applications before this Court, both defendants sought order of the Court - (1) to dissolve the injunction granted against them (2) that an enquiry as to damages suffered by them as a result of the injunction be directed (3) costs of the applications. The 2nd defendant asks for an alternative order i.e. that the injunction be varied so as to permit 2nd defendant to carry on or conduct its activities in the ordinary course of business upon such terms and conditions as the Court deems just.

Held:

[1] Both the London proceedings and the Kuala Lumpur proceedings are substantially the same. Present proceedings in Kuala Lumpur are an abuse of the process of the Court.

[2] Even though the first defendant's application did not contain a prayer for stay of proceedings, prayer 4 contained "such further or other orders or directions be made or given as this Honourable Court deems fit" allow the Court to grant the stay.

[3] Plaintiffs have by their affidavits admitted that they own no assets within the jurisdiction. The undertaking given as to damages cannot be enforced. If plaintiffs fail in this action, the first defendant will suffer damage which plaintiffs cannot compensate. Balance of convenience is in favour of 1st defendant. Injunction against 1st defendant dissolved.

[4] The letter of undertaking was signed *inter alia* by one Mr. R.D. Patel a director of both defendant companies in his capacity as a director for the first defendant. The first defendant did not fully own all the shares in the 2nd defendant. Veil of incorporation is not lifted and the 2nd defendant remains a separate entity. Thus, there is no cause of action against 2nd defendant. Injunction dissolved.

[Injunction granted dissolved. Enquiry as to damages suffered to be held on a date to be fixed. Plaintiff to pay costs of both applications.]

Cases referred to:

Mosbert Acceptance Ltd. & Anor. v. Liew Choon Kee & Anor. [1983] MLJ 62
Lim Eng Kay v. Jaafar bin Mohamed Said [1982] CLJ (Rep) 190
Elliot v. Pierson [1948] 1 All ER 939
Jones v. Lipman [1962] 1 All ER 442
Bank Bumiputra Malaysia Bhd. v. Lorrain Osman & Ors. [1985] 2 MLJ 236
Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1980] MLJ 109

For the applicant/first defendant - N. Chandran; M/s. Adnan Sundra & Low
Applicant/second defendant - Anand Krishnan; M/s. James Foong & Anand
For the plaintiff - YM Raja Aziz Addruse & Radha; M/s. Rashid & Lee

JUDGMENT

Zakaria Yatim J:

There are two applications before this Court. In both these application, the two defendants are seeking the order of the Court - (1) to dissolve an injunction granted against them on 13 January 1986; (2) that an enquiry as to damages suffered by them as a result of the injunction be directed; and (3) costs of the applications. The second defendant asks for an alternative order viz; that the injunction be varied so as to permit the second defendant to carry on or conduct its activities in the ordinary course of business upon such terms and conditions as the Court deems just.

The injunction granted by the Court on 13 January, was in the following terms:

(a) the first defendant, Manilal & Sons (M) Sdn. Bhd. by their agents or servants or otherwise be restrained and an injunction is hereby granted restraining them from disposing of or creating any charges, liens, pledge or any other encumbrances over the issued and paid-up capital of the second defendant; and

(b) the second defendant, Vegetable Oils Industries Bhd. by their agents or servants or otherwise be restrained and an injunction is hereby granted restraining them from disposing of or creating any charges, liens, pledge or any other encumbrances over all the assets of the second defendant both movable and immovable.

The plaintiffs are foreign companies carrying business in London and New York. The two defendants are companies incorporated in Malaysia and carrying on business in Malaysia.

The plaintiffs claim that the defendants are indebted to them in the sum of RM10,448,139 plus a further sum of more than RM748,719 if the price of tin is valued below 6,500 per metric ton. On 25 November 1985 the first defendant company wrote a letter to the first plaintiff admitting the debt. On the same date the first defendant wrote another letter to the first plaintiff asking the latter not to commence legal proceedings against it for a period of twenty-one days from the date of the letter. The letter further stated that within the said period of twenty-one days, the first defendant would pledge in favour of the plaintiffs all the issued share capital of its subsidiary company namely the second defendant. In addition, the first defendant would procure the creation of a legal fixed and floating charge over all the assets of the second defendant in favour of the plaintiffs as security for the payment of the said debt. One of the signatories to the said letter was R.D. Patel who was a director of the first and second defendant companies. The defendants, however, failed to comply with the undertaking contained in the second letter. The plaintiffs commenced an action in London against the first defendant and its associate companies and obtained a Mareva order

restraining them dissipating their assets up to a maximum limit of 3,700,000. On 11 January 1986, the plaintiffs filed a writ here against the defendants and subsequently obtained the order in terms stated below.

I shall now deal with the application of the first defendant. Mr. N. Chandran, Counsel for the first defendant argued that since the plaintiffs had instituted similar proceedings against the first defendant in London, the present proceedings in Kuala Lumpur are a duplicity of the London proceedings and should be stayed. The plaintiffs, he added, cannot maintain the present action here, and accordingly the injunction cannot be allowed to stand.

In my judgment, the present proceedings before this Court are an abuse of the process of the Court and should be stayed, and the injunction ordered against the first defendant be dissolved. Both the London proceedings and the Kuala Lumpur proceedings are substantially the same. In both proceedings, the plaintiffs are claiming the same amount of money based on the same letters of undertaking dated 25 November 1985.

In *Mosbert Acceptance Ltd. & Anor. v. Liew Choon Kee & Anor*. [1983] 1 MLJ 62, Rajah J said,

> It therefore appears to me that, as the plaintiffs cannot be allowed to run their claim for US$350,000 in tandem both in California and in Singapore, clearly the Singapore action must be stayed.
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> What I propose to do is to order a stay of the proceedings in Singapore until the action run in California has been litigated to a finish in the American Courts ...

In my view, the passage above applies in the present case. Although in *Mosbert's* case, the Court in California had given judgment, the plaintiffs' appeal against that decision was still pending. The situation in the present case is quite similar to that in *Mosbert's* case.

YM Raja Aziz, Counsel for the plaintiffs, submitted that the first defendant's application did not contain a prayer for stay of proceedings and the Court should not consider the question of stay. Mr. N. Chandran, referred to prayer 4 in his application, viz., "such further or other orders or directions be made or given as this Honourable Court deems fit." In his submission, he formally asked the Court to grant the stay under prayer 4. I think prayer 4 is wide enough to enable the Court to grant the stay. In *Lim Eng Kay v. Jaafar bin Mohamed Said*, [1982] CLJ (Rep) 190, Salleh Abas FJ, as he then was, in delivering the judgment of the Federal Court said,:

> We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors ... In any case prayer (e) in para. (7), 'Any other relief, which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for 'loss of earning' in para. 5(a) should entitle the Court to make such an assessment ...

Apart from duplicity or proceedings, the first defendant should succeed in his application on the ground that the plaintiff's undertaking, as to damages, cannot be enforced as they have no assets within jurisdiction. All the plaintiffs and foreign companies resident abroad. The plaintiffs, in their affidavit affirmed on 4 February 1986, admitted that they "do not have any assets within jurisdiction of this Court." If the plaintiffs do not succeed at the trial, the first defendant will suffer damages which the plaintiffs cannot compensate. Furthermore, I find that the balance of convenience should be decided in favour of the first defendant.

I shall next deal with the second defendant's application.

Mr. Anand Krishnan, Counsel for the second defendant submitted that the plaintiffs have no cause of action against the second defendant as there is no privity of contract between the plaintiffs and the second defendant. According to him, the plaintiffs' claim against the second defendant is entirely based on the letters written by the first defendant to the first plaintiff on 25 November 1985.

The letters were signed by three persons one of whom was Mr. R. D. Patel. Mr. R. D. Patel is the director of the first defendant as well as the second defendant. It is clear from the letters of 25 November when Mr. R. D. Patel signed the letters, he signed them as director of the first defendant. When the first defendant pledged "all the issued share captial" of the second defendant, it was an arrangement between the first defendant and the first plaintiff. Although the first defendant owns about 60% of the issued and paid up capital of the second defendant, the second defendant remains a separate entity from the first defendant. Whatever undertaking given by the first defendant in the two letters, such undertaking did not bind the second defendant.

Y.M. Raja Aziz submitted that all the shares in the second defendant are owned by the first defendant and by another company Maniyus Holdings Sdn. Bhd., which, according to him, is controlled by the first defendant. He seems to suggest that in view of this, the second defendant is bound to comply with the undertaking. He cited *Elliot v. Pierson* [1948] 1 All ER 939, and *Jones v. Lipman* [1962] 1 All ER. 442, in support of his argument.

It seems to me that YM Raja Aziz was asking the Court to lift the corporate veil of the second defendant. In *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman and Ors.* [1985]2 MLJ 236, I had occasion to consider *Jones v. Lipman, supra* and at p. 244, I said,

> In *Jones & Anor. v. Lipman & Anor.,* the first defendant agreed to sell freehold land with registered title to the plaintiffs for 5,250. Pending completion he sold and transferred the land to the defendant company of which he and a clerk for his solicitors were shareholders and directors for 3,000, of which 1,564 was borrowed by the defendant company from a bank and the rest remained owning to the first defendant. The Court held that the defendant company was a cloak for the first defendant, who could compel a transfer of the land to the plaintiffs, and they could decree specific performance against both defendants. Russell J in his judgment said:
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> The defendant company is the creature of the defendant, a device and sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity ... an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In the present case, the situation is different from that in *Jones v. Lipman*. From evidence available, the first defendant does not fully own all the shares in the second defendant. In *Lorrain's* case, I refused to lift the corporate veil in respect of five companies which were not fully owned by Lorrain. See *Lorrain's* case *supra*., p. 247. The Court will only lift the corporate veil of a company if the justice of the case so demands. See *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar and Restaurant Workers & Anor*. [1980] 1 MLJ 109, and *Lorrain's* case, *supra*., at p. 245. In the instant case there is no justification for the Court to lift the corporate veil of the second defendant.

Since the second defendant is a separate entity from the first defendant, the undertaking given by the first defendant does not bind the second defendant. The plaintiffs have, therefore, no cause of action against the second defendant, and accordingly there is no serious question to be tried. In the circumstances, the injunction granted against the second defendant must be dissolved.

For the reasons stated above, I make the following order:

1) The injunction granted on 13 January 1986 against the first and second defendants **must** be dissolved forthwith.

2) An enquiry as to damages suffered by both the defendants by reason of the injunction will be held by the Registrar on a date to be fixed.

3) The plaintiffs will pay the costs of these two applications to both the defendants.

Also found a [1988] 2 CLJ 620